Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-449

CARMINE J. PERSICO, JR.,
Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

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No. .....

CARMINE J. PERSICO, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Carmine J. Persico petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The memorandum orders of the court of appeals and of the District Court are not reported. They are reproduced respectively as Appendix "A" and "B". The court of appeals' denial of Persico's petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix "C".

Jurisdiction

The judgement of the court of appeals was entered on June 8, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 23, 1976. The jurisdiction of this Court is invoked under § 1254(1), Title 28, U.S.C.

Questions Presented

1. Whether the imposition of a sentence under § 4208(a)(2), Title 18, U.S.C. vests in the sentencing court continuing jurisdiction to consider a claim by the defendant pursuant to § 2255, Title 28, U.S.C. that the United States Board of Parole has failed to afford him serious and meaningful parole consideration contrary to the provisions and the Congressional intent in the enactment of the statute under which he has been sentenced?

2. Whether the United States Board of Parole has denied a defendant sentenced under § 4208(a)(2), Title 18, U.S.C. due process of law when it decides to hold the defendant beyond its own established guidelines for parole release (which apply to all prisoners) on the predominant basis of the nature and severity of the offense for which the prisoner stood convicted, while completely disregarding the defendant's institutional performance and response, and when the reasons for continuing confinement beyond the maximum guideline period lack factual basis?

3. Whether the United States Board of Parole is compelled by law to give institutional performance and conduct due effect as the mainstay standard for parole release, when a defendant is incarcerated pursuant to a sentence imposed under § 4208(a)(2), Title 18, U.S.C.?

4. Whether the United States Board of Parole can continue a defendant's parole application for a period of three years to the near eve of his mandatory release date, without affording the defendant serious and meaningful parole consideration as intended by the statute (§ 4208(a)(2), Title 18, U.S.C.) under which sentence was imposed? Can the United States Board of Parole lawfully deny a defendant sentenced under § 4208(a)(2), Title 18, U.S.C. parole release, and continue his parole application to the near eve of his mandatory release date on the basis of the nature and severity of the offense?

5. Whether a United States district court denies a prisoner due process of law when it fails to consider his application attacking parole procedures for nearly a one-year period of time?

Rule Involved

Section 2255 of Title 18 United States Code provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing there-

on, determined the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgement was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgement vulnerable to collateral attack, the court shall vacate and set the judgement aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgement on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to the test legality of his detention.

Statement

Carmine J. Persico, Jr. filed a petition with the United States District Court for the Eastern District of New York under § 2255, Title 28, U.S.C. asserting that his sentence, imposed under § 4208(a)(2), Title 18, U.S.C., was being totally disregarded by the United States Board of Parole and that his application for relief in the United States District Court for the Eastern District of Illinois, the judicial district in which he was incarcerated, was being set aside and disregarded so as to deny him due process of law.

Mr. Persico was sentenced by Hon. John F. Dooling, United States District Judge, in the United States District Court for the Eastern District of New York, on June 6, 1969. Following his conviction by jury of § 1951, Title 18, U.S.C. Judge Dooling indicated that because of the number of trials and length of prosecution in petitioner's case, that the entry of a judgment of conviction against him would result in denial of due process of law. The United States Court of Appeals for the Second Circuit in *United States* v. *Dooling*, 406 F.2d 192, 199 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969) ordered the trial judge to impose judgment of conviction against Persico and to sentence him. Resultantly, the trial court entered judgment of conviction and sentenced Persico to a fourteen year term of incarceration, which term was notably diametrically opposite to the trial court's original intent. However, sentence was imposed under § 4208(a)(2), Title 18, U.S.C., and the trial judge was to later say that he would never have given such a long sentence if it was not pursuant to § 4208(a)(2), Title 18, U.S.C.

Following petitioner's incarceration on January 27, 1972, his application for parole release was continued by the United States Board of Parole in October, 1972 until April, 1975, for an institutional review hearing. Prior

to petitioner's scheduled hearing in April, 1975, Mr. Persico's casemanager prepared a Special Progress Report which was witness to Mr. Persico's excellent institutional performance and conduct. However, the recommendation of the report was that:

> "*In view of the notoriety of this particular case*, the Classification Committee recommends that an en banc hearing be conducted (emphasis added)."

The Special Progress Report failed to set forth any basis for a summary referral, and Mr. Persico filed papers in the United States District Court for the District of Columbia seeking relief pursuant to §§ 2201, 1361 Title 28, U.S.C., to enjoin the United States Board of Parole from referring his case for *en banc* consideration until he was first informed of all adverse matters in his file; the reasons and factual basis for the *en banc* referral; for an opportunity to controvert the basis for *en banc* referral, and to respond to any and all adverse matters in his file; an opportunity to inspect and examine all matters to be considered by the United States Board of Parole in passing on his application for parole release, and to be informed of the criteria considered in passing on applications for parole. Moreover, Mr. Persico submitted that should there be a denial of parole, that he be informed of conditions or requirements which he must fulfill to obtain favorable consideration, and should there be a departure from the Parole Board's own guidelines for parole release, that he be afforded explanation for such departure in the denial of his application for parole release.

On April 2, 1975, the District of Columbia court granted a Government application for transfer of Persico's application to the United States District Court for the Eastern District of Illinois, the judicial district in

which Mr. Persico is incarcerated. The Court specifically stated:

> "The Court further concludes that the burden on the Government of bringing the plaintiff to this district . . . [Eastern District of Illinois] . . . for hearings, the availability of witnesses and files in the district of confinement, and the availability of speedier resolution in that district all militate in favor of transferring the case there."

The Court for the Eastern District of Illinois failed to act on Mr. Persico's application for relief. On August 22, 1975, petitioner's attorneys wrote the court and asked for argument or disposition in the matter. The court did not respond. In the meantime, the Parole Board summarily designated petitioner's parole application "original jurisdiction"*, and on April 28, 1975, the National Appellate Board denied his parole application and continued Mr. Persico for a period of thirty-six months without further review. The decision is contained in Appendix "D". The decision gave no value or consideration to the Congressional emphasis on rehabilitation as a standard for release of prisoners whose sentences were imposed under § 4208(a)(2), Title 18, U.S.C. The decision denied Persico parole on the basis of the severity and nature of the offense upon which he was convicted, and in conjunction with the set-off of his parole application to April, 1978, the near eve of his mandatory release date, the Parole Board was saying that nothing the petitioner could do would gain him parole release, not to

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* Mr. Persico previously was also designated "special offender" and as in the case of the designation of his application as one of "original jurisdiction" he was not afforded opportunity to controvert or respond to adverse matters in his file or to in any way negate his classification nor was he given any reasons therefor.

say consideration as a defendant sentenced pursuant to § 4208(a)(2), Title 18, U.S.C. The Parole Board moreover failed to afford petitioner the relief requested in his papers originally filed with the District of Columbia court*, and the reasons for continuing his confinement beyond the maximum Parole Board guideline period lacked factual basis. On October 15, 1975, the United States Board of Parole affirmed the April 28, 1975 decision**, and Persico thereafter moved the United States District Court for the Eastern District of New York for relief pursuant to § 2255, Title 28, U.S.C.

The District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit both manifestly found that there is not continuing jurisdiction under § 4208(a)(2), Title 18, U.S.C. for the sentencing court to review claims concerning a prisoner's "parole treatment". However, it is

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* At or about the time argument was scheduled on the § 2255 application in the Eastern District of New York, the Eastern District of Illinois scheduled February 19, 1976, as the date for argument on the Government's motion to dismiss appellant's papers originally filed with the United States District Court for the District of Columbia. This date was nearly one year after the case was transferred to the Eastern District of Illinois, and was the first instance the court took any action concerning the case. Persico subsequently retained local counsel and his prayer for relief was incorporated into a writ for habeas corpus, which is presently pending in the Eastern District of Illinois.

** Mr. Persico's salient factor score, however, was adjusted by the Parole Board to 7 from a previous score of 5. However, such a significant change in the salient factor score played no part and made no difference in the determination of his appeal. The Parole Board continued in the assertion that his application for parole release would be denied seemingly on the basis of the nature and severity of the offense upon which he stood convicted on June 6, 1969, at which time the sentencing court imposed its sentence pursuant to § 4208(a)(2), Title 18, U.S.C.

submitted to this Court that an abrogation of a sentence imposed under § 4208(a)(2), Title 18, U.S.C. in the manner outlined goes beyond a shallow claim of "parole treatment." Mr. Persico's continued incarceration is against the grain of the concept of due process and essential fairness in our mode of jurisprudence, and the sentencing court, it is respectfully submitted, not only has continuing jurisdiction but, in this case, had the obligation to correct the distortion and denial of the sentence it originally imposed under § 4208(a)(2), Title 18, U.S.C., which distortion and denial amounted to a denial of due process.

Reasons for Granting the Writ

The determination of the sentencing court to sentence petitioner under § 4208(a)(2), Title 18, U.S.C. is a significant one. *Grasso* v. *Norton*, 520 F.2d 27, 33 (2d Cir. 1975). The expectation of the sentencing court, and the Congressional intent in the enactment of the statute, was that a prisoner sentenced under § 4208(a)(2), Title 18, U.S.C. would be given serious and meaningful parole consideration, and if his prison performance warranted, the grant of early parole. Consequently, the United States Board of Parole should consider prison performance in its determination of a prisoner's application for parole release, when the prisoner's sentence is imposed under § 4208(a)(2), and such parole consideration should be afforded at an earlier date than the one-third point of his sentence permitted by § 4202, Title 18, U.S.C. *Grasso* v. *Norton, supra.*

Petitioner's institutional performance and response were given no effect by the United States in its consideration of his application for parole release. His Special Progress Report was that of a model prisoner; however, because of purported matters in his file, which he was

never given opportunity to controvert before the Parole Board, he was classified "special offender", his application designated "original jurisdiction", and denied parole on the basis of the nature and severity of the offense. Additionally, his application for relief in his parole procedures went unheeded by the United States District Court for the Eastern District of Illinois.

Perusal of the totality of the situation about petitioner's parole application evidences denial of due process of law, warranting relief in the nature of habeas corpus. Persico's institutional performance and prison conduct has been disregarded and has been for naught, for his denial of parole has been predicated on factors outside his reach to amend (the nature and severity of the offense). He has not been given opportunity to controvert adverse matters in his file, warranting his classification as a "special offender" and the designation of his parole release application as "original jurisdiction". He does not know, nor has he ever been told what he must do to gain early parole release under the statute under which his sentence was imposed.

Under the "reasons" for petitioner's denial of parole, no prisoner could ever gain parole, not to say consideration under § 4208(a)(2), Title 18, U.S.C., because the nature and severity of the offense would necessarily travel with him the entire period of incarceration.

The Parole Board's unwillingness to afford Persico early parole release at all is evidenced by the fact that when petitioner's salient factor score was corrected from 5 to 7, indicating parole release within a time range of thirty-six to forty-five months,* rather than forty-five to fifty-five months under a salient factor score of 5, such

* The United States Parole Board's guidelines for parole release, which apply to all prisoners, are contained in 28 C.F.R. 220 and can be found in Appendix E.

correction did not merit in the eyes of the Parole Board one iota of difference in the Parole Board's consideration of Mr. Persico's application for parole release. The guidelines apply to all prisoners, and at the time of the correction to petitioner's salient score, he was incarcerated over forty-five months.*

Resultantly, petitioner moved the sentencing judge in the judicial district in which sentence was imposed for relief pursuant to § 2255, Title 28, U.S.C.

It was submitted that nothing he could do would gain him parole, and under the reasons for denying parole, which were patently insufficient as a basis for the denial of parole,** no convicted defendant could ever unravel himself. All factors regarding the nature and severity of the offense were before the sentencing judge, who was delegated the power and responsibility to impose a sentence reflecting all such factors and other relevant criteria before it at the date of sentence. For the Parole Board to deny parole and to continue petitioner to April, 1978, the near eve of his mandatory release date under a sentence otherwise affordable under § 4202, Title 18, U.S.C., in view of the totality of the circumstances, it was submitted, was improper, illegal and an abuse of discretion. Cf. *United States ex rel. Mayet* v. *Sigler*, 403 F. Supp. 1243 (M.D. Pa. 1975); *United States* v. *Silverman*, — F.2d — (3d Cir. 7/15/76). As Judge Feinberg wrote in his concurring and dissenting opinion in *Grasso* v. *Norton*, *supra:*

* The guidelines of the Parole Board manifestly utilizes a system which gives weight to a multitude of factors including the severity of the offense. *Kortness* v. *United States*, 514 F.2d 167, 169 (7th Cir. 1975).

** See *Haymes* v. *Regan*, 525 F.2d 540, 543, 544 (2d Cir. 1975); *King* v. *United States*, 492 F.2d 1337 (7th Cir. 1974).

> "Congress has not removed rehabilitation as the most important standard governing release at least under (a)(2). Therefore *both this court and the Board* (emphasis supplied) are bound to respect the intent of Congress expressed in Section 4208 (a)(2).
>
> * * *
>
> "The plain fact is that at that point . . . [one-third of prisoner's sentence] . . . , the (a)(2) prisoner's institutional adjustment was meant by Congress and the sentencing judge to be the most important consideration (520 F.2d at 39)."

Petitioner moved the sentencing court for reduction of sentence to reflect conditions affording appellant immediate parole release, or under the authority of § 1361, Title 28, directing the Board of Parole to effectuate petitioner's release under parole supervisory conditions in accord with the statutory scheme under which Mr. Persico was sentenced, or for such other and further relief as the court may have deemed just and proper.

The reasoning employed by the Parole Board to deny petitioner parole was diametrically opposite to the import of § 4208(a)(2), Title 18, U.S.C. The denial of serious and meaningful parole consideration coupled with the totality of the circumstances compelled relief by the sentencing court. This Court poignantly stated in *Davis* v. *United States*, 417 U.S. 333, 343, 344, 94 S. Ct. 2298, 41 L. Ed. 109 (1974):

> "[The legislative history to § 2255, Title 28, U.S.C.] *makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.* As the Court pointed out in United States v. Hayman, 342 U.S. 205, 219, 72 S. Ct. 263, 272, 96 L. Ed. 232 (1952),

> the 'history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. *On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.*' Thus, there can be no doubt that the grouds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas corpus statute, under which relief is available on the ground that '[a person] is in custody in violation of the Constitution *or laws* (Court's emphasis) or treaties of the United States.' . . . *In recommending to Congress what eventually became § 2255, the Judicial Conference Committee on Habeas Corpus Procedure stated that '[t]he motion remedy broadly covers all situations where the sentence is "open to collateral attack". As a remedy, it is intended to be as broad as habeas corpus.'* (emphasis added)."

The thrust of petitioner's argument in the courts below is that in light of the material circumstances set forth herein, that his continued incarceration is both improper and illegal, and that petitioner has suffered "grievous loss" from the abrogation of sentence imposed by Judge Dooling under § 4208(a)(2), Title 18, U.S.C. Consequently, petitioner's claim alleges a miscarriage of justice in terms of the sentence imposed against him, and sets forth exceptional circumstances where the need for the remedy afforded by § 2255, Title 18, U.S.C. is apparent. The nature of petitioner's claim has been recognized

as both substantial and meritorious. *Grasso* v. *Norton, supra; Kortness* v. *United States, supra; United States* v. *Silverman, supra; United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *Garafola* v. *Benson*, 505 F.2d 1212 (7th Cir. 1974); *United States* v. *Randle*, 408 F. Supp. 5 (N.D. Ill. 1975); *Stroud* v. *Weger*, 380 F. Supp. 897 (N.D. Pa. 1974). It is believed that this Court should affirm petitioner's contention that the sentencing court has the power, authority and obligation to correct, modify, amend, reduce a sentence imposed, if determined that the sentence imposed is not being carried out by prison or parole authorities, and that the court has the power, authority and obligation to release a prisoner from incarceration under a claim pursuant to § 2255, Title 28, U.S.C. or to resentence him if it finds that he has been denied due process of law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

Memorandum Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of June, one thousand nine hundred and seventy-six.

Present: HON. PAUL R. HAYS
HON. WILLIAM H. MULLIGAN
HON. THOMAS J. MESKILL
Circuit Judges.

Dkt. 76-2024

UNITED STATES OF AMERICA,
Appellee,

—against—

CARMINE J. PERSICO, JR.,
Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the order of said District Court

be and it is hereby is affirmed on the opinion below. The mere imposition of a sentence under 18 U.S.C. § 4208 (a) (2) does not vest continuing jurisdiction in the sentencing court to review the prisoner's parole treatment, or to reduce the sentence after the time limits of Fed. R. Crim. P. 35 have run.

/s/ PAUL R. HAYS
PAUL R. HAYS
/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN
/s/ THOMAS J. MESKILL
THOMAS J. MESKILL

Appendix B

Memorandum Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

75 C 2033

(60 Cr. 147)

UNITED STATES OF AMERICA,

—against—

CARMINE J. PERSICO, JR., et al.,

Defendants.

APPEARANCES:

MARC A. ROSENBERG, Esq. (Messrs. ROSENBERG, ROSENBERG & ROCKMAN) for defendant-petitioner

FRED F. BARLOW, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for the Government.

DOOLING, *D.J.*

Petitioner was sentenced on June 6, 1969, in 60 Cr. 147, to a term of fourteen years under Section 4208(a)(2). Appeals from the judgment of conviction delayed petitioner's surrender until January 27, 1972. Petitioner has not been paroled. His first parole meeting was in about June of 1972, and resulted in his being continued without parole for an institutional review hearing in April 1975. At some point petitioner was classified as a Special Offender. The April 1975 meeting resulted in a recommendation that, "In view of the notoriety of this particular case, the Classification Committee recommends that an *en banc* hearing be conducted." The case was

designated "original jurisdiction" and referred to the Regional Directors of the Board of Parole on April 28, 1975. The National Appellate Board continued petitioner for an institutional review hearing in April 1978. The offense was rated "high severity," and petitioner was considered as having a salient factor score of 5. The guidelines' range for such an offense and set of salient factors is 45-55 months, and it was noted that petitioner had served 38 months. It was concluded that a decision outside the guidelines was warranted. The basis of the decision, as quoted in counsel's brief was:

> "There is not a reasonable probability that you would live and remain at liberty without violating the law because of your criminal history. BOARD POLICY LIMITS A CONTINUANCE TO NOT MORE THAN 36 MONTHS WITHOUT REVIEW. YOUR CONTINUANCE HAS BEEN LIMITED BY THIS POLICY. Your offense was part of a large-scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer risk than indicated by the salient factor score."

An appeal was taken, and heard in Dallas, Texas, on or about October 8, 1975. It was then realized that petitioner's correct salient factor score was 7 rather than 5, and that, therefore, the guideline range was 35 to 45 months rather than 45-55 months. The decision was, nevertheless, affirmed.

Petitioner argues that the sentence imposed on him has been ignored; that he has been denied the parole consideration that is his entitlement under a Section 4208

(a)(2) sentence; and that, in essence, by considering undisclosed communications from the Justice Department and otherwise departing from appropriate procedures, the Board of Parole has so distorted the sentence and subverted its own regulations that the sentencing court should grant relief.

Petitioner misapprehends the intention of the Section 4208(a)(2) sentence. It is in no sense a reservation to the sentencing court of a continuing power to review the action of the Parole Board. It is not a direction to the Board to release the defendant at a date earlier than the ordinary parole eligibility date (Section 4202) or before his mandatory release date (Section 4161). Section 4208 (a)(2) simply removes the lower limit on the term of incarceration that otherwise results from the existence of Section 4202 and requires the Board of Parole to exercise its powers under Section 4203 without reference to the constraint Section 4202 otherwise imposes.

The Board of Parole, in performing its duty under Section 4203, is not required to make its decisions within its guidelines. The guidelines are empirical generalizations, and determinations outside the guidelines may well be required by judgments arrived at in strict obedience to the admittedly very general standards of Section 4203.

The cases petitioner relies on are all cases in which correction of sentence was appropriate because their real effect was not evident at sentence time to court and counsel and the sentences produced an unanticipated protraction of incarceration. That is not this case.

Petitioner may have just complaint to make against his parole treatment. That, however, is not a matter for

the sentencing court but for the Courts which have control over the place of petitioner's confinement or jurisdiction to review the action of the Board of Parole in petitioner's case.

In the circumstances of this case there is no occasion for an evidentiary hearing in this Court.

It is, accordingly.

ORDERED that application for relief under 28 U.S.C. § 2255 Rule is denied, and the application, treated as a motion to resentence or for reduction of sentence is denied.

Brooklyn, New York
February 20, 1976.

JOHN DOOLING, JR.
U. S. D. J.

Appendix C

Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

Present: HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
HON. THOMAS J. MESKILL,

Docket No. 76-2024

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

CARMINE J. PERSICO, JR.,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

Order of Court of Appeals Denying Rehearing En banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of July, one thousand nine hundred and seventy-six.

Docket No. 76-2024

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

CARMINE J. PERSICO, JR.,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

Appendix D

Parole Boards Notice of Action

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

(SEAL)

NOTICE OF ACTION

Name Carmine J. Persico, Jr.

Register Number 74666-158 Institution Marion

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Institutional Review Hearing in April 1978 Conditions or remarks: REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 5. You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by

this policy. Your offense was part of a large scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer parole risk than indicated by the salient factor score.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.

.....
(Region—Specify)
National Appellate Board XXX
(Check)

April 28, 1975
(Date Notice sent)

NFB
(Docket Clerk)

ADULT

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Immigration law violations Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 16 mo.
LOW MODERATE				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Drugs marihuana, simple possession (less than $500). Forgery/fraud (less than $1,000) Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 25 mo.
MODERATE				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs", possession with intent to distribute/sale (less than to $5.00) Embezzlement (less than $20,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprison of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/Transporting of Aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale).	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 30 mo.
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possession $20,000-$100,000). Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Embezzlement ($20,000 to $100,000) Firearms Act, possession/purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purpose) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.	32 to 38 mo.
VERY HIGH				
Robbery (weapon or threat) Drugs: "Hard drugs" (possession with intent to distribute sale) [no prior conviction for sale of "hard drugs"]. "Soft drugs", possession with intent to distribute/sale (over $5,000) Extortion Mann Act (force) Sexual act (force)	26 to 36 mo.	36 to 45 mo.	45 to 55 mo.	55 to 65 mo.
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs" (possession with intent to distribute/sale) for profit [prior conviction(s) for sale of "hard drugs"]. Espionage Explosives (detonation) Kidnapping Willful homicide	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.

2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.

3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

4. If an offense behavior involved multiple separate offenses, the severity level may be increased.

5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.

6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

Supreme Court, U. S.
FILED
FEB 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-449

In the Supreme Court of the United States

OCTOBER TERM, 1976

CARMINE J. PERSICO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a) and the district court (Pet. App. 3a-6a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1976. A petition for rehearing was denied on July 23, 1976 (Pet. App. 7a). The petition for a writ of certiorari was filed on September 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sentencing court may review parole release decisions under 28 U.S.C. 2255 and, if so, whether petitioner was arbitrarily denied release on parole.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to obstruct commerce and of obstruction of commerce by robbery from an interstate shipment, in violation of 18 U.S.C. 1951. He was sentenced to concurrent terms of 14 and nine years' imprisonment, with parole eligibility in the discretion of parole officials pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2). He began serving his sentence on January 27, 1972, in Atlanta, Georgia; he was transferred two months later to the federal prison at Marion, Illinois.

Petitioner first applied for and was denied parole in June 1972.[1] He was considered a second time in April 1975, after which the Board of Parole concluded (Pet. App. 9a-10a):

> Your offense behavior has been rated as very high severity. You have a salient factor score of 5.[2]

[1]Prior to petitioner's parole consideration, his Bureau of Prisons case worker prepared a prison progress report, including a description of petitioner's institutional adjustment and an evaluation. The report recommended that an "en banc hearing" be conducted in petitioner's [c]ase "in view of the notoriety of this particular case" (Pet. 6). Petitioner filed suit in the United States District Court for the District of Columbia, seeking to enjoin the Board of Parole from referring petitioner's case for "en banc consideration" until all adverse material in his file had been disclosed and he had been afforded an opportunity to respond. Petitioner also sought disclosure of all material, including his presentence report, that would be before the Board. On April 2, 1975, the United States District Court for the District of Columbia transferred the matter to the Eastern District of Illinois, where petitioner is confined (Pet. 6-7).

[2]On review, the Board recognized that petitioner's salient factor score is 7, which indicates a range of 36 to 45 months to be served before release for cases with good institutional performance and adjustment. This computational error did not, however, affect the Board's decision (Pet. App. 4a).

> You have been in custody a total of 38 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 45-55 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant facts and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law because of your long criminal history. Board policy limits a continuance to not more than 36 months without review. Your continuance has been limited by this policy. Your offense was part of a large scale or organized criminal conspiracy or an ongoing criminal enterprise. An unusually sophisticated or professional manner was evident in the planning or commission of the offense. It is believed that you are a poorer parole risk than indicated by the salient factor score.

On appeal, the full Board of Parole affirmed the decision (Pet. 8). Petitioner's case was set for another hearing in April 1978 (Pet. App. 9a).

In December 1975, petitioner filed in the United States District Court for the Eastern District of New York a motion for correction and reduction of sentence pursuant to 28 U.S.C. 2255. Arguing that the Board's decision not to grant him immediate parole was inconsistent with the intentions of the sentencing judge and the policies underlying Section 4208(a)(2), petitioner asked the sentencing judge to resentence him "to a length of incarceration as intended by the court when it first sentenced him and [*sic*] under 18 U.S.C. 4208(a)(2)" (A. 172-173).[3]

[3]"A." refers to the appendix in the court of appeals.

On February 20, 1976, the judge who originally sentenced petitioner held that the imposition of sentence under Section 4208(a)(2) did not give the sentencing court continuing jurisdiction to review actions of the Parole Board (Pet. App. 3a-6a). In denying petitioner's motion, the court also noted (Pet. App. 5a):

> The cases petitioner relies on are all cases in which correction of sentence was appropriate because their real effect was not evident at sentence time to court and counsel and the sentences produced an unanticipated protraction of incarceration. That is not this case.

The court of appeals affirmed, holding that the district court lacked jurisdiction (Pet. App. 2a).

While his motion under Section 2255 was pending in New York, petitioner filed a similar complaint, this time under 28 U.S.C. 2241, in the United States District Court for the Eastern District of Illinois, where he is confined. In that *habeas corpus* action petitioner has raised a number of challenges to his conviction and his treatment by the parole authorities, including all the claims presented here. The district court held a hearing on the petition June 21, 1976, and a supplemental hearing November 23, 1976.[4] On February 1, 1977, the court held that petitioner should have received a hearing before he was designated as a "special offender" by the Bureau of Prisons, and it ordered that he be given such a hearing. The court rejected petitioner's remaining attacks on his continued confinement.

ARGUMENT

1. Petitioner contends that the court of appeals' holding—that Section 2255 actions in the sentencing court may

[4]The supplemental hearing was ordered to consider the effect of *Holmes* v. *United States Board of Parole*, 541 F. 2d 1243 (C.A. 7).

not be used to challenge the decisions of the parole authorities—conflicts with *Kortness* v. *United States*, 514 F. 2d 167 (C.A. 8). We agree with petitioner that there is a conflict among the circuits on this question. Compare *Kortness* and *United States* v. *Salerno*, 538 F. 2d 1005 (C.A. 3), rehearing *en banc* denied, 542 F.2d 628 (Section 2255 is available to test parole decisions), with *United States* v. *DiRusso*, 535 F. 2d 673 (C.A. 1), *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938 (C.A. 2), and *Coil* v. *United States*, C.A. 7, Misc. No. 76-8086, unpublished order filed September 17, 1976, certiorari denied, January 10, 1977 (No. 76-5742) (parole decisions must be tested in *habeas corpus*).[5] It may be that, in an appropriate case, the conflict among the circuits will require this Court's resolution. There is no need for consideration of it in the present case, however, because petitioner has not stated a claim cognizable under Section 2255 even in the Third and Eighth Circuits.

The Eighth Circuit recently has elaborated upon its holding in *Kortness*. *United States* v. *White*, 540 F. 2d 409 (C.A. 8), explained that *Kortness* allows sentencing courts to review their sentences in light of parole decisions under only two circumstances: where the parole authorities have denied a prisoner "meaningful consideration" for parole, in violation of the principles announced in *Garafola* v. *Benson*, 505 F. 2d 1212 (C.A. 7),[6] and where, after

[5]See also *United States* v. *Huss*, 520 F. 2d 598, 603 (C.A. 2); *Freeman* v. *United States*, 254 F. 2d 352, 353-354 (C.A. D.C.).

[6]*Garafola* held that the parole authorities must give persons sentenced under 18 U.S.C. (1970 ed.) 4208(a)(2) a hearing at or close to the completion of one-third of their sentence; the court concluded in *Garafola* that the Board of Parole's practice—which is no longer followed—of giving a person sentenced under Section 4208(a)(2) a hearing promptly after the beginning of the sentence, and on occasion deferring further consideration until well after the one-

sentencing, the parole authorities have changed their paroling procedures in a way that alters "the import of the judge's sentence" (540 F. 2d at 411). See also *Ryan* v. *United States*, C.A. 8, No. 76-1779, decided January 7, 1977; *Fields* v. *United States*, 542 F. 2d 472 (C.A. 8); *Pope* v. *Sigler*, 542 F. 2d 460 (C.A. 8); *United States* v. *Clinkenbeard*, 542 F. 2d 59 (C.A. 8); *Jacobson* v. *United States*, 542 F. 2d 725 (C.A. 8). The Third Circuit, in an opinion denying the petition for rehearing *en banc* in *Salerno*, has interpreted its decision as adhering to the principles established in *White*.

We believe that *Kortness* and *Salerno* were wrongly decided. Section 2255 provides for relief only when the sentence, or the proceedings leading to it, were defective, and the sentence is therefore infirm. *Davis* v. *United States*, 417 U.S. 333; *Affronti* v. *United States*, 350 U.S. 79, 83. The district court's power over the length of sentence expires 120 days after the sentence has been imposed or the judgment has been upheld on appeal.[7] Fed. R. Crim. P. 35. This time limit is jurisdictional and may not be extended. Fed. R.

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third point, prevented the Board from giving adequate attention to the prisoner's institutional record. Petitioner has not contended that he did not receive a hearing at or near the one-third point of his sentence.

[7]See *United States* v. *DiRusso*, C.A. 1, No. 76-1291, decided December 27, 1976, slip op. 5, 6 ("the division of responsibility between the sentencing court and the Parole Commission would be skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer period than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's decision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body").

Crim. P. 45(b).[8] Persons desiring to attack the execution of their sentences are entitled to relief only in the district in which they are confined, as 28 U.S.C. 2241 provides.

In any event, *Kortness* and *Salerno*, as interpreted in *White*, offer no help to petitioner. Petitioner has received the hearing required by *Garafola*, and no changes in parole procedures after the date of petitioner's sentence have altered its "import." He has simply been denied parole because, in the view of the Parole Commission, he does not deserve to be released so early in his sentence. The district court was therefore without jurisdiction of this case, even under the authorities most favorable to petitioner.

2. Even if the district court had jurisdiction in this case, however, it did not err in rejecting petitioner's demand to be released. Parole decisions are entrusted to the discretion of the Parole Commission. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219, 231, provides that the Commission is not an "agency" for purposes of Sections 554, 555, 556 and 557 of the Administrative Procedure Act, and that the actions of the Commission in releasing or declining to release prisoners "shall be considered actions committed to agency discretion for purposes of section 701(a)(2)" of the Administrative Procedure Act. This means, as the Conference Committee explained (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 36 (1976)), that only the Commission's rulemaking processes, and not its parole decisions in individual cases, are open to judicial review. The type of review that petitioner seeks to obtain therefore is not available.

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[8]See *United States* v. *Norton*, 539 F. 2d 1082 (C.A. 5), petition for a writ of certiorari pending (No. 76-5675); *United States* v. *Becker*, 536 F. 2d 471 (C.A. 1); *Thompson* v. *United States*, 536 F. 2d 459 (C.A. 1).

Nothing in the former Section 4208(a)(2)[9] calls for a different result. Section 4208(a)(2) was designed to allow district courts to give indeterminate sentences. *Grasso* v. *Norton*, 520 F. 2d 27, 32 (C.A. 2). It allowed district courts to eliminate the statutory minimum amount of time a prisoner normally would be required to serve before becoming eligible for parole. But it was not intended to compel the parole authorities to grant early parole; to the contrary, it was designed to increase, rather than reduce, the flexibility of the parole authorities. See H. R. Rep. No. 1946, 85th Cong., 2d Sess. 3 (1958). Neither the statute nor anything in its legislative history indicates that district courts were to be given the power to second-guess parole decisions whenever the parole authorities did not release the prisoner after one-third of the sentence had been served.[10]

[9]A similar provision in the Parole Commission and Reorganization Act, 90 Stat. 222, will be codified at 18 U.S.C. (1976 ed.) 4205 (b)(2).

[10]Moreover, to the extent petitioner here complains about constitutional or statutory improprieties in the actions of the parole authorities, the case recently decided by the Eastern District of Illinois is the proper vehicle for the resolution of these claims. Petitioner's action in the Eastern District of New York asks the sentencing court to resentence him, and the sentencing judge already has indicated (Pet. App. 5a) that petitioner's continued imprisonment is not inconsistent with the intention at the time of sentencing. The proceeding in Illinois resolved petitioner's due process and statutory claims, and petitioner would not be entitled to relitigate these claims in New York. *Sanders* v. *United States*, 373 U.S. 1, 15-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1977.